Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1997

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated

Petitioners,

v.

COUNTY OF ADAMS, et. al.,

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated

Petitioners

v.

COUNTY OF ADAMS, et. al.,

CORRECTED
PETITION FOR WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

MARY C. WICKENKAMP, NSBA NO.16396
COUNSEL OF RECORD
4831 S. 58TH ST.
LINCOLN, NEBRASKA 68515-1412
(402) 488-1921

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE NEBRASKA SUPREME COURT ERRED IN RELYING, IN PART, ON A SUBSEQUENTLY ENACTED STATUTE IN CONSTRUING NEBRASKA LAW TO HOLD THAT NO CONTRACTUAL RIGHT VESTED TO EMPLOYER GENERATED PENSION CONTRIBUTIONS UNDER NEB.REV.STAT.§23-2310 IN VIOLATION OF THE CONTRACT CLAUSE,ARTICLE I, SECTION 10, CLAUSE 1, AND THE DUE PROCESS CLAUSE. OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

PARTIES TO THE PROCEEDING

Petitioners

Daniel Hoins and Byron Buzek are residents of Cass County and Saline County, Nebraska, respectively, and bring this action on behalf of themselves and approximately 6,000 other persons who are similarly situated and reside in the state of Nebraska, pursuant to Neb. Rev. Stat. Section 25-319. The Class consists of all past and current employees of the Defendant Class of Nebraska Counties, who have participated in the Retirement System for Nebraska Counties since January 1, 1983, or are currently participating in said system.

Defendants

The Defendants include ninety one Nebraska Counties which participate in the Retirement System for Nebraska Counties established by Neb. Rev. Stat. Section 23-2301 et. seq. and specifically include the following Nebraska Counties:
Adams, Antelope, Arthur, Banner, Blaine, Boone, Box Butte, Boyd, Brown, Buffalo, Burt, Butler, Cass, Cedar, Chase, Cherry, Cheyenne, Clay, Colfax, Cuming, Custer, Dakota, Dawes, Dawson, Deuel, Dixon, Dodge, Dundy, Fillmore, Franklin, Frontier, Furnas, Gage, Garden, Garfield, Gosper, Grant, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Johnson, Kearney, Keith, Keya Paha, Kimball, Knox, Lincoln, Logan, Loup, Madison, McPherson, Merrick, Morrill, Nance, Nemaha, Nuckolls, Otoe, Pawnee, Perkins, Phelps, Pierce, Platte, Polk, Red Willow, Richardson, Rock, Saline, Sarpy, Saunders, Scottsbluff, Seward, Sheridan, Sherman, Sioux, Stanton, Thayer, Thomas, Thurston, Valley, Washington, Wayne, Webster,

Wheeler, and York.

THE RETIREMENT SYSTEM FOR NEBRASKA COUNTIES, an Agency of the State of Nebraska, and THE PUBLIC EMPLOYEES RETIREMENT BOARD, an Agency of the State of Nebraska; and Harry A. Spencer, in his capacity as a member of the Public Employees Retirement Board; Robert Corner, in his capacity925Xamember of the Public Employees Retirement Board; Robert Giese, in his capacity as a member of the Public Employees Retirement Board; Al Curtis Robinson, in his capacity as a member of the Public Employees Retirement Board; William Lindsay, Jr.,in his capacity as a member of the Public Employees Retirement Board; James D. Murphy, in his capacity as a member of the Public Employees Retirement Board; and Connie Witt, in her capacity as a member of the Public Employees Retirement Board. and E. Benjamin Nelson, Governor of the State of Nebraska.

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OPINIONS BELOW

The opinion of the Nebraska Supreme Court is published at Hoiengs v. County of Adams, 254 Neb. 64,574 N.W.2d 498 (1998) and is reprinted in the Appendix herein. The 1994 opinion of the Nebraska Supreme Court in this case is published at Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994) and is reprinted in the Appendix herein. Relevant portions of the Nebraska County Employees Retirement Act are also reprinted in the Appendix hereto.

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STATEMENT OF JURISDICTION

Petitioners assert that this Court has jurisdiction under 28 U.S.C. §1751 to review a February 27, 1998 decision of the Nebraska Supreme Court. This is a case wherein the Nebraska Supreme Court refused to rule upon the issue of whether a district court decision violated the Due Process Clause and the Contract Clause in giving a later enacted statute retrospective effect to reduce the previously vested rights of county employees to employer generated pension contributions. Instead, the Nebraska Supreme Court ruled that the constitutional issue was moot because Neb.Rev.Stat.§23-2310 ,the statute setting the amount of the employee contribution setting the employer contribution at 250 percent of the amount contributed by an employee was ambiguous in light of Neb.Rev. Stat. §23-2308 and that therefore, §23-2310 must be construed as meaning 150 percent despite the express language of §23-2310 setting the amount at 250 percent. In doing so the Nebraska Supreme Court relied, in part, upon the language of a subsequently enacted statute, LB1057, as evidence of legislative intent supporting its holding that 150 percent

was the proper pension contribution.

Petitioners argue that this court has jurisdiction to review a decision wherein a state determines that a subsequently enacted statute impairs or negates the obligations of a contract to which the state or its agents is a party.

STATEMENT OF THE CASE

The first of these two consolidated cases, Hoieings v. County of Adams, et. al., Lancaster County District Court Docket 472, Page 146 (hereinafter referred to as Hoieings I) was filed in 1991 as a class action under the Declaratory Judgment Act in Lancaster County District Court. The Plaintiff was initially William Fairbanks, but Plaintiff Daniel Hoins, aka Hoiengs was later substituted as Plaintiff. Named as Defendants were 91 Nebraska Counties and the Retirement System for Nebraska Counties. This matter was previously before the Nebraska Supreme Court. See, Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994).

On April 15, 1992, after the filing of the first case but before trial, the Nebraska Legislature passed LB1057 which changed the language of §23-2310 and actually reduced the amount of the employer funded contribution from 250% to 150% for all previous years. On August 18, 1992 the Lancaster County District Court granted a demurrer dismissing the first action for failure to state a cause of action. The first case was appealed to the Nebraska Supreme Court. The Nebraska Supreme Court on May 12, 1994 reversed and remanded, finding that the Plaintiff had stated a cause of action in contract. LB1057 and the issue of retrospective application thereof was not discussed in the Nebraska Supreme Court's 1994 opinion. On May 2, 1995, while the first suit was pending on

remand in Lancaster County District Court the second of these two consolidated actions was filed. That second suit involved the same parties and requested a determination that LB1057 was unconstitutional. The Lancaster County District Court consolidated the two cases in December, 1996.

The second case, Hoiengs v. County of Adams, et. al, Lancaster County District Court Docket 527, Page 114 (hereinafter referred to as Hoiengs II) was filed May 2, 1995. Like Hoiengs I, it involved a class action, and related to provisions of the County Retirement Act. Hoiengs II sought a declaratory ruling that a 1992 Amendment to the Act,LB1057, was unconstitutional in that it violated the due process and contract clauses of the U.S. and Nebraska Constitutions.

Both cases were brought under the Nebraska Declaratory Judgments Act. 25-21,145 et. seq. The cases were consolidated for trial over objection of the Plaintiffs. On December 20, 1995 the Court heard reciprocal motions for Summary Judgment on behalf of Plaintiffs and Defendants.

On March 28, 1996 the Lancaster County District Court granted Summary Judgement for Defendant Counties Cass and Saline and against Plaintiffs Buzek and Hoins. That Court specifically held: 1) that the County Retirement Act from 1983 to 1992 required an employer contribution of 150% because, although the express language of Neb.Rev.Stat. §23-2310(1) clearly specified an employer contribution of 250% that because §23-2308 "refers to a requirement that the County Clerk pay the 100% of the employee's contribution and the 150% of the employer contribution, totalling 250%" 2) that LB1057 was a "curative" act that applied retrospectively to the County

Retirement Act; and 3) that because of the retrospective effect of LB1057 the Plaintiffs' rights to an employer contribution under the County Retirement Act only vested in an employer contribution of 150% instead of the 250% specified in §23-2310(1).

In the decision at issue here the Nebraska Supreme Court held that the express language of Neb.Rev.Stat. §23-2310 in setting the pension contribution of a public employer at 250% of the amount contributed by the employee was ambiguous and made in error by the Nebraska Legislature. The Nebraska Supreme Court in doing so refused to rule on the constitutionality of the later enacted LB1057 but went on to cite LB1057 in its opinion as evidence of legislative intent that the contribution requirement of 250% contained in §23-2310 must be read as 150%.

CONSTITUTIONAL PROVISIONS AND STATUTES

Contract Clause, Article I, Section 10, Clause 1, United States Constitution

> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Due Process Clause, Amendment 5, United States Constitution.

> "No person shall. . .be deprived of life, liberty, or property, without due process of law. . ."

Amendment 14, Section 1, United States Constitution

> ". . .No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

Neb.Rev.Stat.(Reissue 1991).**23-2301.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2302.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2305.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2306.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2307.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2308.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2309.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2310.** See Appendix.

REASONS FOR GRANTING CERTIORARI

I. WHETHER THE NEBRASKA SUPREME COURT ERRED IN RELYING,IN PART, ON A SUBSEQUENTLY ENACTED STATUTE IN CONSTRUING NEBRASKA LAW TO HOLD THAT NO CONTRACTUAL RIGHT VESTED TO EMPLOYER GENERATED PENSION CONTRIBUTIONS UNDER NEB.REV.STAT.§23-2310 IN VIOLATION OF THE CONTRACT CLAUSE,ARTICLE I, SECTION 10, CLAUSE 1, AND THE DUE PROCESS CLAUSE. OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioners urge this court to grant certiorari to determine whether the Nebraska Supreme Court is construing Nebraska law in derogation of the Contract Clause, Article I, Section 10, Clause 1, and the Fifth and Fourteend Amendments to the United States Constitution. This question is posed in the context of whether Petitioners have a right to an employer generated pension contribution of 250% of the amount contributed by the employee as stated in Neb.Rev.Stat.§23-2310,,enacted in 1983.

The question before the Nebraska Supreme Court on appeal here was whether the District Court erred in finding that LB1057, a statute enacted subsequently to §23-2310, should be given retrospective effect to reduce the 250 percent contribution required of ninety one Nebraska Counties under §23-2310 to 150 percent.

The Nebraska Supreme Court ruled that the issue of the constitutionality of LB1057 was moot because the Petitioners had no vested contractual right to an employer

contribution of 250 percent, notwithstanding the language of §23-2310.. In so holding, the Nebraska Supreme Court held that the express language of §23-2310 which required a contribution of 250 percent was in conflict with the language of §23-2308 which states:

> "The County clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amount deducted from the compensation of the employee in accordance with §23-2307."

The Nebraska Supreme Court held that because of the language of §23-2308 that §23-2310 was ambiguous and therefore each reference to 250 percent contained within §23-2310 must be read as meaning 150 percent. In reaching this conclusion the Nebraska Supreme Court relied upon the legislative history of previous legislation and in part upon the language of LB1057 as evidence of the intent of the Nebraska Legislature that the amount of the employer contribution be 150 percent instead of 250 percent.

The Nebraska Supreme Court earlier ruled in this case that the Petitioners had, in asserting a right to an employer contribution of 250% under §23-2310 stated facts constituting a cause of action which, if proven, would give rise to a legal liability under the law. Hoeings v. County of Adams, 245 Neb. 877 (1994).

The Nebraska Supreme Court first dealt with this case in 1992 on appeal from the District Court's order sustaining Defendants' demurrers to Plaintiff's Petition. Plaintiff sought a declaratory ruling that the amount of the employer requirement required by the County Retirement Act, codified at Neb.Rev.Stat. §23-2301 et.seq., (Reissue 1991) was 250% and not the 150% that the Defendant

Counties were actually paying.

The Nebraska Supreme Court issued its opinion in that case, Hoeings v. County of Adams, 245 Neb. 877 (1994), holding as follows: 1) that the District Court did have jurisdiction of this matter and the parties, 2) that substitution of Plaintiffs Hoeings for Fairbanks was proper, 3) that Plaintiff did state a cause of action on behalf of himself and the class, 4) that Neb.Rev.Stat. §23-135 did not apply, 5) that the Administrative Procedures Act did not apply, 6) that there was no misjoinder of parties or causes of action, 7) that Plaintiff could maintain an action for declaratory judgment, 8) that sovereign immunity had been waived for both the Retirement System and the Counties by the terms of the County Retirement Act; and 9)that the PERB was not an administrative agency for purposes of the County Retirement Act.

In reaching its 1994 decision in this case the Nebraska Supreme Court necessarily had to determine what amount of employer contribution the County Retirement Act requires in order to determine whether Plaintiff had stated, or could state, any cause of action. Nebraska law requires that when considering whether a District Court's order sustaining a demurrer should be affirmed or reversed the Court must consider whether a Plaintiff can ultimately recover. A case will not be reversed where the complaining party will not be entitled to a judgment in any event. Swink v. Smith, 173 Neb. 423 (1962); Bohmont v. Moore, 141 Neb. 91, (1942). Appellant submits that this Court, in deciding Hoeings, logically had to consider all aspects of the law to determine if there was any way in which Hoeings could ultimately recover under the allegations in his petition. This court was required to consider the case on the law as it existed on the date of judgment. Summerville v. North Platte Valley Weather

Control Dist., 170 Neb. 46 (1960). State v. Thayer, 235 Neb. 70 (1990).

In reaching its holding the Hoeings Court noted that the employer contribution under the act was set by Neb. Rev. Stat. §23-2310 (Reissue 1991). Hoeings at 883-884,896. A matter controlled by statute presents a question of law. In Re: Interest of Jaycox, 250 Neb. 67 (1996).

A determination that the employer contribution is 250% is a necessary and integral part of the Court's ruling in Hoeings and, as such, is the law of the case. State ex rel Hilt Truck Line, Inc. v. Jensen, 218 Neb. 591 (1984). In Latenser v. Intercessors of the Lamb, Inc., 250 Neb. 789 (1996), the Court reiterated the basic premise of the doctrine of the law of the case, which states that the holding of an Appellate Court on questions presented to it in reviewing proceedings of a Trial Court become the law of the case, and those holdings conclusively settle, for purposes of that litigation, all matters ruled upon either expressly or by necessary implication. Latenser held that, under this doctrine, matters previously addressed in the Appellate Court are not reconsidered unless the party seeking such reconsideration presents materially and substantially different facts. Nobel v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1953). Noble made it clear that when an Appellate Court rules on whether factual allegations in a petition state a cause of action such that a demurrer will not lie, that ruling establishes the law of the case and where those same facts are later proven on remand the law of the case as established by the Appellate Court controls.

As the Nebraska Court has previously stated, in a 'cause of action' is a judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has breached

that duty. In determining whether a demurrer should lie, the Court must also decide whether there is any way Plaintiff can recover. If there is no way in which a plaintiff can recover an order sustaining, a demurrer will be affirmed, even if the District Court sustained the demurrer for the wrong reason.

The Nebraska Court in 1994 concluded very clearly that a cause of action was stated, that if proven, would entitle the petitioners to a judgment.

A reading of this Court's decision in Hoeings clearly demonstrates that this Court considered the question of the amounts of the employer contribution in considerable detail and found that the Petitioners had a viable cause of action.

The 1998 decision of the Court in effect took away the Petitioners constitutionally vested cause of action, and went on to rule that Petitioners had never had a right to the pension contribution of 250%. The Nebraska Court did so in partial reliance on the language of LB1057 as evidence of the intent of the Nebraska Legislature.

Petitioners urge in support of a grant of certiorari that there exist no independent and adequate state grounds for the Nebraska Supreme Court's decision in this case which do not involve issues of constitutional magnitude.

The Nebraska Supreme Court in its 1998 decision simply held that Petitioners had no right to a pension contribution of 250% because the statute setting the 250% requirement when read in light of earlier legislation had to be regarded as absurd. The Court did so in complete disregard for its earlier 1994 decision finding Petitioners had a cause of action which under Nebraska law is defined as a set of facts which, if proven, give rise to a legal

liability (Hoieings v. County of Adams, 245 Neb. 877 (1994). However, in doing so, the Nebraska Supreme Court also cited the subsequently enacted statute.

Before a party may assert due process argument it must establish that it has legitimate claim of entitlement to right being asserted. New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474 (7th Cir. 1990). Petitioners have such a claim by virtue of the language of §23-2310 and the decision of the Nebraska Supreme Court in Hoiengs v. County of Adams, 245 Neb. 877 (1994).

Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by subsequent act of the legislature. Ritter v. Drainage Dist. No. 1 of Otoe and Johnson Counties, 137 Neb. 866 (1940). Statute may not operate retroactively where it would impair obligation of contract or interfere with vested right. State ex re Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445 (1979). Monahan Cattle Co., v. Goodwin, 201 Neb. 845 (1987). Karrer v. Karrer, 190 Neb. 610 (1973). retroactively to deprive property owner of his previously vested rights. City of Omaha v. Glissmann, 151 Neb. 895 (1949).A municipal ordinance cannot operate retroactively to deprive a property owner of previously vested property rights. Baker v. Sommerville, 138 Neb. 466 (1940).

Due process clauses' procedural protection of property is a safeguard of security of interest that a person has already acquired in specific benefits. Assoc. of State Prosecutors v. Milwaukee County, 544 N.W. 2d 888 (Wis. 1996). Each listed member and retiree of county retirement plan had a property interest in retirement system protected by due process clause. The gravity of a property deprivation is irrelevant to the question of whether such

rights are violated without due process. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989). A West Virginia court has recognized that pension plan participants had contractually vested property rights created by pension statutes and that such rights were enforceable and could not be impaired or diminished by the state. A Wisconsin Court has held that the right created by the pension statues vest in a constitutional sense even though the right created by the statute may be inconsistent with the prior expressed intent of the legislature as demonstrated by the legislative history. Wisconsin Retired Teachers Assn'n v. Employee Trust Funds Board,537 N.W.2d 400 (Ct. App. 1995). There the court relied on Giessel and held that the annuitants of the Wisconsin Retirement System had a property interest in the earnings of their trust fund. State Teacher's Retirement Board v. Giessel, 106 N.W.2d 301 (1960).

The Nebraska Supreme Court decided this case in a way which directly contradicts the legal principles laid down by this Court in Home Buildings & Loan Assn. v. Blaisdell, 290 U.S.398 (1934);(Obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them. . .and impairment. . .has been predicated upon laws which without destroying contracts derogate from substantial contractual rights.) United States Trust Co. v. New Jersey, 431 U.S. 1, (1977); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). See also, Nev. Employees Assoc., Inc. v. Keating, 903 F.2d 1223 (9th Cir. 1990).

While it is also recognized that generally the construction given by state courts to State laws and State constitutions are binding and conclusive upon the Federal Courts, the rule does not extend to cases in which this Court is called upon to interpret the contracts of the States.

Jefferson Branch Bank v. Skelly., 66 U.S. 436 (1861). Petitioners submit that this is a case where the Nebraska Supreme Court construed the terms of a contract between petitioners and political subdivisions of the State of Nebraskan, namely, the ninety one counties of the State that participate in the County Employees Retirement System. Vogel v. Bartels, 1 Neb. App. 1113, 510 N.W.2d (1993). Petitioners argue that because of the State's direct involvement in this contract via the ninety-one counties, that the construction of the Nebraska Supreme Court in this case not be regarded as binding and conclusive and that this court has and should take jurisdiction under 28 U.S.C.§1751. Yazoo & M.V.R.Co. v. Adams, 180 U.S. 1, reh.den. 181 U.S.580 (1850). Hoadley's Admrs. v. San Francisco, 124 U.S. 639 (1888).

In conclusion Petitioners submit that there exist no independent and adequate grounds which justify the decision of the Nebraska Supreme Court and which do not involve issues of constitutional magnitude.